

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHEENA RENEE ISOM,

Defendant-Appellant.

UNPUBLISHED

April 22, 2014

No. 313418

Berrien Circuit Court

LC No. 2011-005025-FH

Before: METER, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals from her jury trial conviction of threatening or intimidating a witness, MCL 750.122(7)(a). Defendant was sentenced to one year of probation. Because defendant has not established error requiring reversal, we affirm.

Sherrie Hall, complainant in this case, intermittently dated and lived with a man named Eric Gill for a period of four years. In 2010, while not dating Hall, Gill entered into a relationship with defendant. It appears that Gill eventually started dating both women at the same time, without their knowledge. Defendant and Hall first became aware of this situation in August 2011. On September 25, 2011, there was a break-in at defendant's home. Defendant suspected that Gill was involved in the break-in or had knowledge of its details. Defendant went to Hall's home in hopes of confronting Gill. Defendant and Hall apparently had a confrontation at Hall's home, which led to Hall filing a police report. Defendant was subsequently charged with breaking and entering Hall's home.

Defendant was arrested for the alleged breaking and entering in October 2011.¹ Soon after the arrest, Hall began receiving threatening phone calls. She reported the calls to the police, who provided her with a recording device to record any future threatening calls. On November 3, 2011, Hall recorded two threatening calls. The first caller did not identify herself; however, Hall identified the caller's voice as belonging to defendant. Hall also referred to the caller by

¹ The record provided to this Court, as well as Michigan's Offender Tracking Information System (OTIS), does not reveal that defendant was ever convicted of breaking and entering, home invasion, or any similar crime.

defendant's first name. The caller neither disputed nor directly acknowledged the name, but did respond when referred to as Sheena. The caller told Hall that something would happen to her if she went to court. Hall turned the recording over to the police, who subsequently arrested defendant for threatening or intimidating a witness.

Defendant first argues that there was insufficient evidence to support her conviction, a question we review de novo. See *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010). "A court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crimes were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999) (citation omitted). "We do not interfere with the jury's assessment of the weight and credibility of witnesses or the evidence, and the elements of an offense may be established on the basis of circumstantial evidence and reasonable inferences from the evidence." *People v Dunigan*, 299 Mich App 579, 582; 831 NW2d 243 (2013) (citations omitted).

MCL 750.122 provides in relevant part:

(3) A person shall not do any of the following by threat or intimidation:

(a) Discourage or attempt to discourage any individual from attending a present or future official proceeding as a witness, testifying at a present or future proceeding, or giving information at a present or future official proceeding.

A review of the record reveals sufficient evidence to allow a rational jury to conclude beyond a reasonable doubt that defendant telephoned Hall and threatened her in an attempt to discourage her from testifying as a witness in defendant's breaking and entering case. The only pending proceeding that Hall was involved in was defendant's alleged breaking and entering. Hall testified that she received a telephone call, during which defendant told her that something would happen to her if she appeared at the proceeding. Hall was able to identify defendant's voice because she had spoken to defendant on the phone in the past and because the caller responded when Hall referred to her as Sheena. Moreover, the jury heard a recording of the telephone call three separate times and heard defendant testify; thus, the jurors were able to determine for themselves whether the voice on the recording belonged to defendant. This evidence provided a sufficient basis for a reasonable jury to conclude that the prosecution established the elements of threatening or intimidating a witness beyond a reasonable doubt.

Defendant next argues that she was deprived of the effective assistance of counsel due to her trial attorney's failure to timely file a witness list. "[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). A defendant cannot be deprived of a substantial defense if he was able to assert his defense theory at trial, even if he was unable to call a witness to testify in support of that theory because of counsel's performance. *Id.*

The trial court refused to allow defendant to present any witnesses, other than herself, to testify on her behalf due to her trial counsel's failure to timely file a witness list. This failure quite obviously fell below an objective standard of reasonableness. Nonetheless, trial counsel's

failure to properly represent his client does not entitle defendant to a new trial because defendant has not established that, but for counsel's error, there is a reasonable probability that the trial would have resulted in acquittal. *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). At trial, defendant testified that she did not make the telephone call at issue and that the voice on the recording was not her own. The only offer of proof defendant made at trial was that her proposed witnesses would testify that the voice on the recording did not belong to defendant. However, the jury heard the recording and heard defendant testify and could make that determination for themselves. Defendant also failed to move for remand in order to offer any other basis to establish a reasonable probability that her proposed witness testimony would have resulted in acquittal. Accordingly, defendant is not entitled to a new trial on the basis of her counsel's failure to timely file a witness list. *Id.*

Defendant also asserts that the trial court erred by admitting certain Facebook posts into evidence.² We review this unpreserved claim for plain error affecting substantial rights. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).

MRE 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Generally, all relevant evidence is admissible. MRE 402.

The Facebook posts at issue are not part of the record provided to this Court. Defendant testified to making several vague Facebook posts that appeared to be directed at an unidentified woman. However, defendant stated that the posts referred to someone other than Hall. None of the posts mentioned or alluded to a pending breaking and entering proceeding. Further, the last Facebook post was made on October 19, 2011. Defendant testified that she was not arrested for breaking and entering until "around Halloween," and the threatening phone call was not made until November 3, 2011. Although the jury could have inferred that defendant was referring to Hall and that she was angry with her because of the situation involving Gill, the Facebook posts only had a tendency to make it more probable than not that defendant was angry at Hall. Defendant's anger with Hall might have been relevant to whether she broke into Hall's home, but it was irrelevant to the elements of threatening or intimidating a witness. It would take a significant inferential leap to conclude, on the basis of the Facebook posts, that defendant was the person who called Hall on November 3, 2011. Moreover, the jury was already well aware of the fact that defendant was angry with Hall due her relationship with Gill and Hall's police report that resulted in defendant's breaking and entering arrest. Accordingly, the Facebook posts were irrelevant to determining whether defendant made the threatening phone call to Hall and should have been excluded. MRE 401, 402.

² The trial court initially refused to admit the Facebook posts on the grounds that they could not be authenticated. However, after defendant acknowledged that she had a Facebook account, the trial court allowed the prosecutor to question defendant regarding the posts she admitted to making.

Nonetheless, defendant is not entitled to reversal on this basis. To obtain reversal for an unpreserved claim of evidentiary error, defendant must establish that the error was outcome determinative. *Coy*, 258 Mich App at 12. The Facebook posts were irrelevant to any element of defendant's crime and, independent of the Facebook posts, there was sufficient evidence to support the jury's verdict, including the telephone call itself and Hall's identification of defendant's voice.

Affirmed.

/s/ Patrick M. Meter
/s/ Peter D. O'Connell
/s/ Douglas B. Shapiro